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Labor and Employment Policies in the US Election 2008 and  
the Upcoming Legislative Agenda

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## **Overview: Diffuse Rather than Coordinated Labor Policies**

The focus of the 2008 Presidential Election in the United States turned from foreign policy to domestic economic policy in response to the global financial crisis and its mounting effects on the US financial, housing, and labor markets. In recent elections, labor policy has not explicitly been at the forefront of campaign issues or political debate. Indeed, parsing out the policy positions of the 2008 presidential candidates, Senator Barack Obama (Democrat, Illinois) and Senator John McCain (Republican, Arizona), required delving into an array of issue areas and proposed legislation that often fell under headings loosely related to what is generally understood as “labor policy” by academics and labor and industrial relations professionals. Neither Senator Obama nor Senator McCain listed labor policy or employment policy as major issue areas on their candidate websites. However, Senator Obama and Senator McCain held opposing positions on specific employment and labor policies which reflected both their individual policy orientations toward labor and employment policy and the historic oppositional positions of the Democratic and Republican parties in the United States.

The opposing positions of the US presidential candidates on labor policy reflected different perspectives on the role of government in economic security and the regulation of the employment relationship. The Democratic Party has historically supported a pro-worker agenda including legal and regulatory support for labor organizing and collective bargaining, income security through job protection, minimum wages, workplace-based health and retirement benefits for workers, and the regulation and/or prohibition of discriminatory practices in hiring, promotion, compensation, and firing (particularly related to race and gender and more recently inclusive of sexual orientation and immigration status).

In contrast, the Republican Party has eschewed a regulatory approach to the labor market and privileged a “laissez-faire” approach to the employment relationship. In general, the Republican Party has opposed labor organizing and collective bargaining, arguing that they are coercive, and instead emphasized the right of each worker to agree on an individual employment contract with his employer. Similarly, the Republican Party has viewed workplace benefits (including health insurance and retirement plans) through a lens of employer flexibility, individual choice, and a preference for privatization. The Republican Party argues that regulatory requirements to provide workers with health and retirement benefits force US-based firms into an uncompetitive position in a global economy. And

finally, the Republican Party views questions of employment discrimination narrowly and proposes that policies are best adjudicated through private mediation.

The labor and employment policies of the 2008 presidential candidates reflected the opposing ideological orientation of their respective parties. The specific policy positions of the candidates were found under a number of functional policy headings rather than as a comprehensive labor policy position. For example, the array of policies which support the participation of women in the labor force (including subsidized child-care, job protections and income support for primary care givers who take family leave, prohibitions against workplace discrimination, and flexible work arrangements) fell under the heading of “Work/Family Balance” in the Obama campaign’s policy materials. In the McCain campaign, the similar issue area, support and protections for women and families in the labor force, fell under the dual headings of “Workplace Flexibility in a Changing Economy” and “Workplace Flexibility and Choice.” Neither candidate explicitly categorized these policies as “labor policies.”

This article describes the labor and employment debates likely to emerge in 2009 and during the Obama administration as well as the positions of the Republican and Democratic presidential candidates on policy issues related to labor policy, employment regulation, and economic security for workers stated during the 2008 campaign. There are two major pieces of legislation, the extension of the Family and Medical Leave Act of 1993 (FMLA) and the pending Employee Free Choice Act (EFCA) which directly address the areas at the heart of national labor policy: 1) terms and conditions of employment and, 2) workplace wages and benefits. In addition, there are several secondary pieces of legislation pending. These acts are primarily constructed as a response to recent anti-labor judicial decisions during the Bush Administration. Secondly, this article outlines policy initiatives beyond the pending legislation which have been significantly affected by the recent global financial crisis: retirement security, pensions, and social security. And finally, this article discusses pending legislation regarding the regulation of workplace discrimination.

## **1. Proposed Changes to Existing Legislation: The EFCA and FMLA**

The two major pieces of pending legislation likely to be at the heart of significant changes in US labor and employment policy in the next administration include 1) changes to the Family and Medical Leave Act, the FMLA, and 2) the Employee Free Choice Act (EFCA). Within this area of employment policy, both presidential candidates supported the current Family and Medical Leave Act of 1993 (FMLA). However, Senator Obama proposed to expand the coverage and the scope of the FMLA while Senator McCain supported an alternative policy framework, the Family Friendly Workplace Act. In the area of labor policy as it pertains to organizing and collective bargaining, Senator Obama supported the EFCA while Senator McCain proposed a presidential commission to study and “modernize” existing labor law.

### **1.1. Employee Free Choice Act (EFCA)**

The Employee Free Choice Act (EFCA, HR 800/S 1041) was passed by the US House of Representatives in the spring of 2007 and has been stalled in the US Senate since the summer of 2007. The EFCA is aimed at updating US labor law and facilitating the ability of workers to organize unions in the new economy. Where the National Labor Relations Act of 1935 anticipated a manufacturing-based industrial unionism, the EFCA modifies that paradigm in recognition of an increasingly service-based economy and the declining dominance of the model of long-term employment with a single employer. A major goal of the EFCA is to reduce the length of time between organizing a majority of a “unit” of workers and the beginning of contract negotiations between the employer and the employees’ recognized union representation. The employer would be obligated to begin first contract bargaining based on a majority “card drive” rather than through a card drive and a subsequent National Labor Relations Board (NLRB) monitored election.

This modification to the legal process for union organizing would reduce the time employers have to retaliate against workers who participate in unionization drives and the time available to coordinate anti-union publicity campaigns. In addition, the EFCA substantially increases the monetary penalties imposed on employers who retaliate against

their employees (harassment or firing) for union organizing or participation. The EFCA would bring the system of first contract bargaining in the United States closer to that presently in place in Canada. The EFCA would also ban the permanent replacement of striking workers and ensure that labor appointees (to regulatory agencies like the National Labor Relations Board) support worker's rights.

Senator Obama's stated policy commitments included ensuring the freedom to unionize without harassment and strengthening the role of the National Labor Relations Board as an advocate for workers. Senators Obama and Biden supported the EFCA and Senator Obama is an original co-sponsor of the legislation. A press release from Senator Obama in June of 2007 stated:

*"The current process for organizing a workplace denies too many workers the ability to exercise their right to do so. The Employee Free Choice Act will allow workers to form a union through majority sign up and card checks, and strengthen penalties for those employers who are in violation. The choice to organize should be left up to workers and workers alone. It should be their free choice."*<sup>1</sup>

Senator McCain and Governor Palin proposed increasing workplace flexibility with an emphasis on portability of firm-based benefits and the modernization of existing labor laws. Senator McCain voted against the EFCA in June of 2007.

*"I am strongly opposed to H.R. 800, the so-called "Employee Free Choice Act of 2007." Not only is the bill's title deceptive, the enactment of such an ill-conceived legislative measure would be a gross deception to the hard working Americans who would fall victim to it."*<sup>2</sup>

Senator McCain had instead co-sponsored and supported alternative legislation, the Secret Ballot Protection Act of 2007. Senator McCain expressed concern that workers who are against unions would be exposed to harassment by union organizers and pro-union co-workers under the guidelines in the EFCA.

A related piece of legislation, also introduced in the US Senate in 2007, was the *Re-empowerment of Skilled and Professional Employees and Construction Tradeworkers (RESPECT) Act (HR 800/S 1041)*. This Act was intended to amend the National Labor Relations Act to modify the definition and corollary exemption of "supervisors" from bargaining units in response to significant differences in the occupational structures in service industries. The legislation is in direct response to the Oakwood Healthcare decision of the National Labor Relations Board which

ruled against the right of nursing supervisors to unionize. Again, Senator Obama supported the RESPECT Act while Senator McCain did not.

## **1.2. The Family and Medical Leave Act (FMLA)**

In addition to strengthening existing US labor law to expand organizing protections for workers, Senator Obama also supported policies to encourage firms (primarily through tax incentives but also through direct regulation) to offer workplace flexibility programs. Senator Obama expressed a commitment to federal policies which extend an array of income supports to working families. Senator Obama also proposed reaching these policy goals through an extension and expansion of *the Family and Medical Leave Act (FMLA)*. The Obama campaign has outlined a policy agenda which expands the policies which make work “work” for families. The first element of the plan is to allow FMLA to cover businesses with 25 or more workers rather than only those firms with 50 or greater. The campaign also planned to encourage states to offer paid leave, not simply unpaid leave (currently state law in a few states).

In addition to the expansion of FMLA, President Obama’s campaign also proposed to expand “after school programs” for school-aged children and extend tax credits for those people providing for children or dependents. The Obama campaign also proposed regulating discriminatory firm practices against caregivers in the workplace. Finally, Senator Obama proposed working with employers to expand flexible work arrangements, including tele-commuting.

The centerpiece of Senator McCain’s labor and employment policy was support for “more flexible work arrangements.” John McCain supported the Family and Medical Leave Act in 1993 (FMLA) and co-sponsored another piece of legislation, the Family Friendly Workplace. According to Senator McCain’s campaign materials John McCain supported:

*“...the Family Friendly Workplace Act, which sought to allow employers to provide flexible work schedules to help employees balance the demands and needs of work and family, such as allowing employees to take compensatory time-off rather than be paid overtime and to work more than 40 hours in one week and correspondingly less in another week.”<sup>3</sup>*

Despite this emphasis on work-life balance, Senator McCain did not state support for the expansion of the FMLA but rather, his campaign called for a National Commission on Workplace Flexibility and Choice. This Commission would be charged with “modernizing” labor laws and determining policy frameworks which can accommodate and encourage workforce flexibility (e.g. frequent change between job, benefit portability, and non-traditional work arrangements) which the McCain campaign associated with global economic competitiveness. Senator McCain also expressed support for tele-working, home-based work, and home-based small businesses and voiced concern that existing labor laws “get in the way” of these areas of potential employment growth and opportunity.

## **2. Income Security: Wages and Benefits**

### **2.1. Wages and Earnings**

In addition to the pay discrimination and equal employment policies discussed in Section 2.3, Senators Obama and McCain proposed policies which directly address the regulation of wages and income. Senator Obama supported pegging the federal minimum wage to the inflation rate rather than basing increases on recurring congressional legislation. Senator Obama also supported the expansion of the Earned Income Tax Credit (EITC), an income support program for the working poor which operates through the federal income tax code.

Senator McCain voted several times both for and against the federal minimum wage during his more than twenty-five years in the US Congress. As a consequence, his exact position on the federal wage was somewhat unclear, however, he did not actively support pegging minimum wage increases to the rate of inflation or to a cost of living adjustment (similar to the Social Security system). Senator McCain argued against the EITC during the 2008 campaign.

## **2.2. Benefits: Pensions, Health Insurance, and Social Security**

In the current economic environment, policies regarding government-based and employer-based retirement plans and pensions have garnered significant public interest. In the US, there are four dimensions of the pension and retirement issue. First is the contrast between public versus private retirement plans and second is the contrast between defined-benefit and defined-contribution retirement plans.

Over the past twenty-five years, employer-based retirement benefits for American workers have slowly shifted from defined-benefit to defined-contribution plans. These defined-contribution plans (colloquially referred to as “401k plans”) shift investment responsibilities to employees and are largely dependent on the stock and bond markets. Defined-contribution plans are constituted by regular contributions by employees and their employers into an employee’s individual retirement account (the employer contribution is often referred to as “the match”). This account is then invested in different financial instruments, partially at the discretion of the employee. The final account balance at retirement is the retiree’s “pension.” Given the age demographics of the US population and the proliferation of these defined-contribution retirement plans, recent dramatic drops in stock markets have produced great uncertainty among the American workforce about the future of their retirement savings and the wisdom of “private” defined-contribution retirement plans.

As a consequence, policy debates about shifting the federal government’s (modest) defined-benefit plan, Social Security, into a hybrid public-private, defined-contribution plan, have lately quieted. In previous elections the policy debates about employer-based retirement benefits have included beneficial tax treatment of both employee and employer contributions to retirement savings and the debates about the extent to which the government monitors or enforces employer obligations to employees promised defined-benefit retirement plans when their employers shift to defined-contribution plans.

Senator McCain, like many in the Republican Party, supported private retirement accounts as a reform of the social security system. Many policy analysts have inferred that this strategy is an incremental step towards modifying the social security system into a



government funded but privately administered defined-contribution plan rather than a more traditional defined-benefit government pension.

Senator McCain's campaign website indicated that he supports "ensuring that workers can choose retirement plans that best suit their needs."<sup>4</sup> A consistent criticism of the American retirement system is that it is employer-based and thus predicated on an industrial economy model of a long-term employment relationship rather than the more fluid service economy employment model. Therefore, the question of benefit portability has advanced the defined-contribution model as traditional pensions tend to be less portable because they require a "vesting period" (generally between three and ten years depending on the employer).

Senator Obama opposed the privatization of social security. However, it is unclear how the Obama administration will manage and respond to the dramatic decline in retirement savings of American workers as a consequence of the global financial crisis.

In addition to pension benefits, the second major employer-based benefit in the American employment system is firm-based health insurance programs. Both Senator Obama and Senator McCain proposed significant changes in the existing system of health insurance coverage. While the ways in which these proposals relate to employers varies, it is not entirely clear how they would alter the existing framework of health insurance as an employment-based benefit. Both candidates received criticism for the cost of the plans they proposed and the extent to which their plans undermined rather than augmented the existing and controversial employer-based health insurance model.

### **2.3. Workplace Discrimination**

Senators Obama and McCain also held different positions on the role of the government in regulating discrimination in the workplace and setting rules for hiring, firing, compensation, and advancement. In the area of employment discrimination law, sometimes categorized as "civil rights" law, there are several pieces of legislation pending in the US Congress. In general the candidates agreed that discrimination in the workplace is undesirable but held opposing viewpoints as to the role of the federal government and the courts in regulating and mediating discrimination.

There are three major pieces of legislation which have been introduced in the US Congress and are likely to either become law or be voted down in the near future. All three of these bills could be characterized as reactions to administrative and judicial rulings on specific employment discrimination cases during the eight years of the Bush Administration.

The first bill is the *Employment Non-Discrimination Act (HR 3685)* which amends the Civil Rights Act of 1964 to prohibit employment discrimination based on sexual orientation. While the presidential candidates had not voted on this legislation, their positions were again in opposition. On Senator Obama's campaign website it stated that he would "pass the Employee Non-Discrimination Act to prohibit discrimination based on sexual orientation or gender identity or expression." Senator McCain expressed concerns that the extending workplace discrimination protections to cover sexual orientation might run counter to the values of some employers.

The *Ledbetter Fair Pay Act (S 1843/HR 2831)* is a direct response to a 2007 Supreme Court ruling in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* The Act establishes a "Paycheck Rule" in gender and pay discrimination cases. The Act designates each paycheck as an independent pay discrimination act rather than counting the discriminatory act as just the first instance of unequal pay for equal work. President Obama co-sponsored the Bill as a Senator, voted for it, and has voiced his continuing support. Lilly Ledbetter, the plaintiff in the original pay discrimination case endorsed Senator Obama and appeared in his campaign advertisements. While Senator McCain stated his support for the principle of "equal pay for equal work," he opposed the Ledbetter Fair Pay Act on the grounds that the legislation would enrich trial lawyers.

The *Paycheck Fairness Act (S 766/HR 1338)* "amends the portion of the Fair Labor Standards Act of 1938 (FLSA) known as the Equal Pay Act to revise remedies for and enforcement of prohibitions against sex discrimination in the payment of wages to: (1) add non-retaliation requirements; (2) increase penalties; and (3) authorize the Secretary of Labor (the Secretary) to seek additional compensatory or punitive damages."<sup>5</sup> Senator Obama explicitly supported the legislation, which would strengthen existing employment discrimination regulation. Senator McCain did not state a position.

### 3. Conclusions

Although employment and labor policy were not at the forefront of the policy debates in the 2008 US Presidential Election, it was an area of significant difference between the two candidates and their respective parties. US Presidential candidates rarely in recent years have spoken explicitly about labor policy, however, the Democratic and Republican Parties have entrenched and opposing policy positions regarding the role of the federal government in ensuring the right to organize and collective bargaining, the right to work free from discrimination, and the right to income and employment security. Given the recent financial crisis, it is likely that President Obama will find it difficult to avoid explicitly addressing employment policies over the next four years. Indeed, the nomination of Representative Hilda Solis as Secretary of the Department of Labor signals a sharp shift in direction of monitoring and enforcement of current labor and employment regulations from the executive branch. Already the media campaign for the EFCA has begun in earnest and is likely to be a one of the early domestic policy challenges for the new congress and administration.

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<sup>1</sup> Obama Calls for Passage of Employee Free Choice Act June 20, 2007

[http://obama.senate.gov/press/070620-obama\\_calls\\_for\\_6/](http://obama.senate.gov/press/070620-obama_calls_for_6/)

<sup>2</sup> Comments in the US Senate, June 26, 2007, The Congressional Record.

<sup>3</sup> John McCain Campaign website, <http://www.johnmccain.com/Informing/Issues/>

<sup>4</sup> John McCain Campaign website, <http://www.johnmccain.com/Informing/Issues/>

<sup>5</sup> The Library of Congress, Summary Description of H.R.1338

<http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR01338:@@D&summ2=m&>